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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re SARITH YIN	G056336
on Habeas Corpus.	(Super. Ct. No. 11CF2822)
	O P I N I O N

Original proceedings; petition for a writ of habeas corpus to challenge a judgment of the Superior Court of Orange County, Francisco P. Briseño, Judge. Petition granted.

Sarith Yin, in pro. per., and Eric R. Larson, by appointment of the Court of Appeal, for Defendant and Petitioner.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Seth M. Friedman and Michael Pulos, Deputy Attorneys General, for Plaintiff and Respondent.

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Sarith Yin seeks a writ of habeas corpus based on the Supreme Court's holding in *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*) that the natural and probable consequences doctrine does not permit an accomplice liability theory to result in a first degree murder verdict. As in this court's recent decision in *In re Loza* (2018) 27 Cal.App.5th 797, 799 (*Loza*), because we cannot conclude beyond a reasonable doubt that the jury relied on the legally valid theory of direct aider and abettor liability—instead of the discredited natural and probable consequences doctrine—we must vacate Yin's first degree murder conviction. On remand, the prosecution may at its discretion accept a second degree murder conviction or retry Yin for first degree murder under a legally appropriate theory.

FACTUAL AND PROCEDURAL BACKGROUND

In Yin's direct appeal, this court previously summarized the underlying facts "in a truncated manner" (*People v. Yin* (July 17, 2013, G046831) [nonpub. opn.] (*Yin*)), and we do the same here concerning the limited evidentiary and procedural facts bearing on the issues on review.[1]

On January 10, 2010, Yin was an active gang member of the We Don't Care (WDC) criminal street gang. He and other gang associates and members of an allied criminal street gang, Tiny Rascals Gang (TRG), confronted a number of males about a half an hour after an earlier contact during which at least one of the opposing males claimed "Surenos" as their gang affiliation. The gang expert at Yin's trial testified most Hispanic gangs in the area of the shooting would be rivals of WDC and TRG.

As Yin and his group approached the others, John "Beaver" Saway yelled "TRG" and fired a .45-caliber semiautomatic pistol, killing Juan Carlos Rodriguez, who was with the other group. Police recovered six .45-caliber casings and five .40-caliber

[1] We grant the Attorney General's unopposed request to take judicial notice of the record in Yin's direct appeal (G046831).

casings from the scene. It was undisputed at trial that shots from Saway's gun caused Rodriguez's fatal injuries.

The day after the shooting, Yin had lunch with his brother and admitted during the confrontation he had fired a .40-caliber gun. On a separate occasion, Yin's brother had seen Yin with a shiny, black .40-caliber handgun. At the lunch, Yin stated he and Beaver should be hired as hit men and that they "got our work done."

With Saway established as the shooter, the prosecutor argued for Yin's conviction for first degree murder as a direct aider and abettor who shared Saway's premeditated intent to kill Rodriguez or, alternately, as an aider and abettor liable under the natural and probable consequences doctrine or as a co-conspirator liable under the same doctrine.

The jury found Yin guilty in count 1 of first degree murder (Pen. Code, § 187, subd. (a))[2] with a corresponding special circumstance finding that the murder was for the benefit of a criminal street gang (§ 190.2, subd. (a)(22)), in count 2 of active participation in a criminal street gang (§ 186.22, subd. (a)), and in count 3 of felon in possession of a firearm (former § 12021, subd. (a)(1)). The jury found Yin's firearm possession was for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)) and that he intentionally discharged a firearm causing death (§ 12022.53, subds. (d), (e)(1)). In a bifurcated proceeding, the trial court found Yin suffered a prior serious felony conviction (§ 667, subd. (a)(1)) and a prior strike conviction. (§§ 667, subds. (d), (e)(1), 1170.12, subds. (b), (c)(1).) The court sentenced defendant to life in prison without the possibility of parole, with a consecutive term of 30 years to life. The court imposed concurrent terms on counts two and three.

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[2] All statutory references are to the Penal Code.

In Yin's direct appeal, this court rejected his challenge to the sufficiency of the evidence to demonstrate WDC was a criminal street gang, but ordered his active gang participation conviction on count 2 stayed under section 654. (*Yin*, *supra*, at p. 2.)

In 2018, Yin filed a habeas petition under *Chiu* in the trial court, which was denied in a ruling that predated this court's published opinion in *Loza*. Yin now renews his habeas challenge in this original proceeding in this court.

DISCUSSION

As a preliminary matter, the Attorney General argues Yin has forfeited his habeas challenge because it is untimely. We disagree. The Attorney General argues that because Yin's petition postdates *Chiu* by almost four years, it is too late to seek relief under that decision. Yin emphasizes that he filed the petition without the aid of counsel upon learning of the *Chiu* decision from a fellow inmate. As Yin also correctly points out, this court in *In re Lopez* (2016) 246 Cal.App.4th 350, 356-360, was the first to hold that *Chiu* constituted a substantive change in criminal law that applied retroactively on habeas corpus to cases such as this that were already final on direct appeal. The Supreme Court reached the same conclusion in *In re Martinez* (2017) 3 Cal.5th 1216, 1222, only four months before Yin filed his petition in the trial court. Substantially longer delays have not barred petitions for habeas as a remedy for unlawful conviction. (E.g., *In re Saunders* (1970) 2 Cal.3d 1033, 1040-1041.) Under these circumstances, there was no unreasonable delay that prevents Yin from seeking relief.

Turning to the merits of Yin's petition, we find it must be granted for the same reasons articulated in *Loza*. There, as here, the trial court instructed the jury on two theories of aider and abettor liability: (1) direct liability where the aider and abettor knows of and shares the perpetrator's intent to commit first degree murder (see CALJIC No. 3.01) and (2) liability under the natural and probable consequences doctrine (CALJIC No. 3.02). (*Loza*, *supra*, 27 Cal.App.5th at p. 802.) Under the latter theory, if a

defendant intentionally aids and abets the commission of a target offense, which the court here identified as assault with a firearm, the jury was told they could find the defendant guilty of a nontarget offense, including murder, provided they also found that the nontarget offense was a natural and probable consequence of the target offense.

In *Chiu*, which postdated the trials both in this case and in *Loza*, the Supreme Court held that the premeditation and deliberation necessary for first degree murder "is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death." (*Chiu*, *supra*, 59 Cal.4th at p. 166.) The Court held that under the natural and probable consequences theory '"the connection between the [aider and abettor's] culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder."' (*Ibid*.) Thus, an aider and abettor's liability for premeditated murder "must be based on direct aiding and abetting principles." (*Id.* at p. 159.)

Here, as in *Loza*, the trial court instructed the jury with CALJIC No. 8.20, which stated: "If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of *the defendant* to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion . . . it is murder of the first degree." (CALJIC No. 8.20, italics added.) But the instruction also stated: "To constitute a deliberate and premeditated killing, *the slayer* must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, decides to and does kill." (CALJIC No. 8.20, italics added.)

Loza explained this instruction was defective under *Chiu* in two respects. First, in *Loza* four codefendants were tried together and, therefore, the first part of the instruction ran afoul of *Chiu*. In particular, the jury could read the "defendant" to refer to any one of the codefendants harboring the requisite "premeditation," rather than Loza

individually, as required under *Chiu* for first degree murder. (*Loza*, *supra*, 27 Cal.App.5th at p. 804.)

Second, and pertinent here, the latter part of the instruction violated *Chiu* because it specified that "a deliberate and premeditated killing" occurs where "the *slayer*" has the requisite premeditation. In *Chiu*, *supra*, 59 Cal.4th at pp. 160-161, the Supreme Court ruled the trial court had erroneously instructed the jury "that to find defendant guilty of first degree murder, the People had to prove that the *perpetrator* acted willfully, deliberately, and with premeditation." (Italics added.) As *Loza* observed, the instructional error in the latter part of CALJIC No. 8.20 "essentially mirrored the error that occurred in *Chiu*, but [with] the word 'slayer' instead of the word 'perpetrator.'" (*Loza*, *supra*, 27 Cal.App.5th at p. 804.)

The Attorney General argues that in a single defendant case such as this, there was no error because the first part of CALJIC 8.20 references the defendant's mental state. But that reference is conditional. It states that *if* the defendant engaged in "deliberation and premeditation," then "it is murder of the first degree." The *if* in this formulation does not mark the defendant's premeditation as a required element. It therefore does not preclude conviction under the second part of the instruction, which states generally—and contrary to *Chiu*—that the slayer's mental state *is* sufficient "[t]o constitute a deliberate and premeditated killing" to convict the defendant of first degree murder. The *Chiu* error therefore remains.

The Attorney General's reliance on *People v. Stevenson* (2018) 25 Cal.App.5th 974 (*Stevenson*), review granted Nov. 14, 2018, S251071, is misplaced.[3] That case involved CALCRIM Nos. 520 and 521, not CALJIC No. 8.20. The CALCRIM instructions in *Stevenson* directed the jury, in deciding the degree of murder to consider whether the particular defendant acted with premeditation, i.e., '"[The] defendant acted deliberately if *he* carefully weighed the considerations for and against his choice . . . ."' (*Stevenson*, at pp. 983-984, original brackets and added italics.) In contrast, CALJIC No. 8.20 as given here injected a *Chiu* violation by authorizing a first degree murder conviction under the natural and probable consequences theory based on the slayer's intent, rather than Yin's. That distinction between the CALCRIM instructions in *Stevenson* and CALJIC No. 820 makes all the difference.

As *Loza* observed, instructional error under *Chiu* requires reversal "*unless* we find the error harmless beyond a reasonable doubt." (*Loza, supra*, 27 Cal.App.5th at p. 805.) This standard applies equally to habeas petitions. (*In re Martinez, supra*, 3 Cal.5th at p. 1225.) Accordingly, the prosecution bears the burden to demonstrate beyond a reasonable doubt that the error did not contribute to the first degree verdict. (*Loza*, at p. 805.)

The Attorney General relies on the jury's finding under the gang special circumstance instruction that "[t]he *defendant* intentionally killed the victim." (Italics added.) The instructions also explained, "If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the

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[3] The Supreme Court's grant of review in *Stevenson* does not appear to be related to the *Chiu* issue here, but instead to the "kill zone" instruction in that case. (See *People v. Stevenson* (2018) 429 P.3d 827 [granting review and deferring further action pending consideration of *People v. Canizales* (2014) 229 Cal.App.4th 820, rev. granted Nov. 19, 2014, S221958], which involved the kill zone issue.) In any event, published cases under Supreme Court review may be cited for their persuasive value, but have no binding or precedential effect. (Cal. Rules of Court, rule 8.1115(e)(1).)

actual killer or an aider or abettor or co-conspirator, you cannot find the special circumstance to be true as to this defendant unless you are satisfied beyond a reasonable doubt that *this defendant* with the intent to kill *aid[ed], abetted, or assisted any actor in the commission of the murder in the first degree*." (Italics added.)

The Attorney General argues this language establishes that Yin *directly* aided and abetted the commission of a first degree murder, fully sharing in what the jury could reasonably conclude was Saway's premeditation and deliberation to kill the victim. After all it was Saway's gunshots that killed the victim, not Yin's. But the language the Attorney General relies on only requires "assist[ing] *any actor in the commission of* the murder in the first degree," which the jury could conclude was satisfied under the natural and probable consequences doctrine by the *slayer's* commission of first degree murder. As discussed above, that contravenes *Chiu*.

The jury's intent-to-kill finding is not the same as finding the premeditation and deliberation necessary for first degree murder. The same is true for Yin's boasts to his brother the day after the murder that he and Saway "should be hired as hit men" and that they "got [their] work done." The "hit men" comment suggests premeditation, but is not dispositive on the issue. The jury could view it as a claim that Yin "should be" hired as a hit man as a perverse gang reward for his conduct, based on most gangs' high regard for violence. The jury did not have to view the statement as a claim that Yin had been acting as a hit man at a time when, as Yin observes in his informal reply, he reacted "by firing gunshots in an immediate response to a member of the victim's group firing shots at them . . . ." In sum, both the "hit men" and "work done" statements are consistent with an intentional slaying, but one that was not necessarily premeditated by Yin.

Of course, the converse is true and the jury could regard the statements as evidence of premeditation and deliberation. But as *Loza* observed, the People's burden to demonstrate the absence of *Chiu* error is a "challenging" one. (*Loza, supra,* 27 Cal.App.5th at p. 805.) "'The . . . test is not whether a hypothetical jury, no matter

how reasonable or rational, would render the same verdict in the absence of the error, but whether there is *any reasonable possibility* that the error *might have* contributed to the conviction in this case. *If such a possibility exists*, reversal is required.'" (*Ibid.*, original italics.) That is the case here.[4]

DISPOSITION

The petition is granted. Yin's first degree murder conviction is vacated and, on remand, the prosecution may either accept a second degree murder conviction or retry Yin for first degree murder with proper jury instructions.

GOETHALS, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.

[4] The Attorney General does not suggest Yin's first degree murder conviction may be saved under the prosecutor's alternate conspiracy theory. That theory also was founded on the natural and probable consequences doctrine, and instructions on the theory as a basis for first degree murder therefore constitute a species of *Chiu* error. (*In re Lopez*, *supra*, 246 Cal.App.4th at p. 357; *People v. Rivera* (2015) 234 Cal.App.4th 1350, 1357.)